

NTSB Order No. EA-4513

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of December, 1996

LINDA HALL DASCHLE,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

CHARLES A. BENSON,

Respondent.

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Patrick G. Geraghty on February 7, 1996.¹ The law judge affirmed the Administrator's order suspending respondent's airline transport pilot certificate, upon finding that respondent had violated 14 C.F.R. 91.13(a).² The law judge, however, reduced the Administrator's

²Section 91.13(a) prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

proposed suspension from 60 to 30 days.³ We deny the appeal.

On November 22, 1994, respondent was the pilot-in-command of a Bell 206B helicopter on a Part 135 charter flight carrying four geologists to observe active volcano activity at Volcanoes National Park, Hawaii. At the time, Brian Sword, an FAA Aviation Safety Inspector, along with other FAA employees, were conducting surveillance regarding compliance with FAA Special Federal Aviation Regulation (SFAR) 171 (which concerns operations of Hawaii air tour operators). Mr. Sword videotaped respondent's flight. Although it was later determined that respondent's operation was not subject to the SFAR, the Administrator brought the instant complaint on the basis of Mr. Sword's observations, and Mr. Sword was the Administrator's sole witness.

Mr. Sword testified that respondent flew the helicopter within the "dead man's curve," i.e., at combinations of heights and velocities that would not have permitted a safe landing in the event of engine failure. See Exhibit A-5 height-velocity diagram. Mr. Sword described respondent's overflight area as crusted, very uneven and jagged lava, at a 10-12 degree upward slope on which there was burning vegetation and escaping steam due to the volcanic activity. According to Mr. Sword, respondent had flown at altitudes varying from 10 to 50 and 100 feet (Tr. at 21), performing a number of slow turns (40 knots or less, ground speed) and stationary hovers. Id. at 20, 24-25. In support of his testimony, he sponsored the videotape he had taken. Exhibit

³The Administrator has not appealed this reduction.

A-4.

Respondent testified in his defense. He denied flying over any molten lava, steam, smoke or burning vegetation. He testified that, with the exception of stationary hovers at 2-3 feet (Tr. at 92) where there was flat, smooth lava on which he could safely land (id. at 95-96), he maintained no less than 300 feet altitude. Tr. at 92 (300-500 feet). But see Tr. at 97 (operated at no less than 100 feet) and 109 (operated at no less than 200 feet). He also testified that he made no low speed turns, and maintained no less than a 60-knot airspeed (except when hovering).

The law judge concluded that Mr. Sword's testimony was the more "reliable and probative." Tr. at 140. He noted the drawbacks of the amateur videotape and, rather than relying on it extensively, used it instead as support and confirmation of Mr. Sword's oral testimony concerning the flight and the terrain.

On appeal, respondent contends that it was error for the law judge to rely on Mr. Sword's testimony regarding the operation of the helicopter and the terrain. He further contends that the videotape was not reliable evidence, citing "deceptive effects of photography such as proportion, space and altitude differentials, angels [sic] and light, and the compression and expansion values of zoom lens." Appeal at 10. Respondent also argues, as a matter of law, that because there was no violation of substantive altitude restrictions in 14 C.F.R. 91.119, or of the helicopter or company flight manuals, there is no specific standard on which

to base a sanction. He further claims that the 30-day suspension is too severe, noting that his livelihood would be severely affected by the law judge's order. Respondent concludes by arguing that the law judge's order affects all helicopter operations in Hawaii, imposing a new, improperly low investigatory and evidentiary standard.

We find no merit to respondent's arguments. While the videotape is, admittedly, not of the finest quality, respondent's attempts to discredit it are unconvincing. The law judge specifically acknowledged its flaws. In any case, the quality of the tape is more than adequate to demonstrate the overall condition of the terrain for someone who has not been to the area.⁴ Respondent's other attacks on Mr. Sword's testimony devolve to a challenge to his credibility, but respondent has not made the showing necessary for us to overturn the law judge's finding in this regard. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge). The law judge's conclusions regarding the quality and credibility of the evidence

⁴Respondent's argument that Mr. Sword's description of the area should not be credited because he did not walk exactly in the flight path is the least convincing of these claims. Mr. Sword could not do so: the park was closed to pedestrian traffic, and it was closed due to the danger from the active volcano. Even respondent testified to purposely hovering over "skylights," areas where molten lava moving just underground was clearly visible from the surface. The videotape confirms Mr. Sword's testimony that the area was characterized by jagged, crusty lava, sloping upward to a ridge, with occasional burning vegetation and escaping steam.

are supported in his decision and the record and are reasonable.

Respondent's challenges to the section 91.13 carelessness regulation are equally unpersuasive. We have on prior occasions considered vagueness arguments in this context and have rejected them. The primary question for us is one of notice: would a reasonable pilot understand that respondent's actions could be found to be careless? There is no question in our minds that the answer is yes. Despite respondent's attempts to underline the fact that operations in the dead man's curve are not prohibited, these operations are to be avoided. The law judge found that respondent operated the helicopter within the curve's parameters.

There is no basis in the record to conclude that respondent did so for reasons that should mitigate the sanction, nor does he so argue.

The law judge's conclusion creates no new standard. See, e.g., Administrator v. Frost, NTSB Order No. EA-3856 (1993); Administrator v. Harrington, NTSB Order No. EA-3767 (1993). And, the fact that the Administrator did not charge respondent with a violation of section 91.119 is not grounds for respondent's conclusion that he did not, in fact, violate that regulation, nor is it grounds for a conclusion that the carelessness charge should not independently be leveled.⁵ Finally, the impact on respondent personally of a 30-day suspension of his certificate is not grounds to mitigate the sanction. Administrator v.

⁵Section 91.119(d) requires helicopters to operate at altitudes that will not create hazards for persons or property on the surface.

Mohumed, NTSB EA-2834 (1988) at p. 11, and cases cited there.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 30-day suspension of respondent's pilot certificate shall begin 30 days from the service of this order.⁶

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁶For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).